Supreme Court, U.S.
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No. 02-1446

IN THE

Supreme Court of the United States

EMERSON ELECTRIC COMPANY,
and
EDWIN L. WIEGAND DIVISION,
EMERSON ELECTRIC COMPANY,
Petitioners,

v.

MOUNT OLIVET TABERNACLE CHURCH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The instant appeal arises from an action filed in the Court of Common Pleas for Philadelphia County, Pennsylvania for damages resulting from a November 26, 1994 fire in the Mount Olivet Tabernacle Baptist Church. At the trial of this case, the jury returned a unanimous verdict in favor of plaintiff and against defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company[1] in the amount of $981,000.00 on May 20, 1999. The Court molded this verdict after the application of delay damages in the amount of $112,122.76 for a total amount of $1,093,122.76.

Emerson has filed unsuccessful appeals to the Pennsylvania Superior and Supreme Courts. Emerson's right of appeal in the courts of Pennsylvania was exhausted with the Pennsylvania Supreme Court's denial of Emerson's application for re-argument on December 27, 2002.[2]

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1. Emerson's Petition identifies the petitioner as "Edwin L. Wiegand Division, Emerson Electric Company." In fact, the judgment in this case was entered against both Emerson Electric Company and the Edwin L. Wiegand Division, Emerson Electric Company. Emerson's counsel, James Sargent, entered an appearance on behalf of both entities and represented both entities throughout the appeals in the state courts. Counsel has not advised plaintiff or the state courts of any change in that representation or of any change in the relationship between the two entities.

2. On January 17, 2003, after Emerson and its counsel ignored respondent's repeated demands for payment of the judgment, plaintiff filed a Petition for Enforcement of the liability of Federal Insurance Company on a supersedeas bond pursuant to Pa. R.A.P. 1734(c). Emerson filed a response to plaintiff's Petition, along with its own Petition for Stay of Execution pending appeal. By Order dated March 18, 2003 the Philadelphia Court of Common Pleas denied Emerson's Petition for Stay and granted Mount Olivet's Petition for Enforcement of the supersedeas bond. On March 28, 2003, Emerson filed a Notice of Appeal to the Pennsylvania Superior Court. On or about the same date Emerson filed an Emergency Motion for Reconsideration with the Philadelphia Court of Common Pleas and Motion for Stay of Execution with the Superior Court of Pennsylvania. On March 27, 2003, Emerson filed its Petition for a Writ of Certiorari to this Court.

This is a product liability case in which the jury found that the fire was caused by defects in the design and manufacture of an industrial immersion heater manufactured by Emerson.[3] At the time, Mt. Olivet presented the heater in question, thousands of photographs, videotapes, several experts, and voluminous documents to support its contention. The overwhelming evidence led the jury to a quick, unanimous verdict in favor of Mt. Olivet. Throughout the litigation and appeals in this case, Emerson has raised and abandoned various defenses.[4]

In essence, Emerson has unsuccessfully contended that its heater was not responsible for the fire, but that there was some other, unidentified, cause of the fire.[5] As a back-up defense, Emerson claimed that it was denied the opportunity to determine an alternative cause of the fire. Emerson claims that Mount Olivet "demolished the fire scene-and all other evidence of cause and origin..." and "unfairly prevented Emerson from investigating the scene and discovering alternative causes of the fire." (Emerson

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3. The immersion heater was placed in a baptismal font to heat the water for a baptism the next day. Mount Olivet presented evidence that the fire occurred when the water drained out of the font and the heater ignited because it lacked certain safety features, such as a high temperature cut off, and/or low liquid shutoff and warnings.

4. Significantly, Emerson did not challenge their immersion heater's design defect or otherwise avail themselves of potentially available product-related defenses. Rather, Emerson maintained that their various burning experiments established that their heater was not the cause of the fire. In its post-trial motion and appeal to the Pennsylvania Superior Court, Emerson asserted as grounds for review that Mount Olivet's use of the heater was not an "intended use" of the product, that Mount Olivet should have been sanctioned for the alleged "spoliation" of evidence and that the trial court improperly admitted evidence of other fires involving Emerson heaters. In its appeal to the Pennsylvania Supreme Court raised only the "spoliation" argument. In its Application for Reargument to the Pennsylvania Supreme Court, Emerson attempted for the first time to raise the "federal question" that is the basis of Emerson's Petition for Certiorari to this Court.

5. At trial, Emerson offered no suggestion as to what the alternative cause of the fire might be.

Petition, pp. 2-3). However, Emerson fails to mention that in addition to the heater itself, fire debris and other physical evidence, along with thousands of photographs, videotapes and documents were presented and made available to Emerson.[6] Indeed, Emerson retained several experts, performed exemplary tests, and constructed models of the church and floor in its defense.

In various motions to the trial court, Emerson requested that some sanction be imposed on Mount Olivet for the alleged "spoliation" of evidence. There was no destruction of evidence. The trial court declined to impose any sanction. The Pennsylvania Superior and Supreme Courts affirmed the trial court's ruling. In a transparent attempt to transform a purely evidentiary issue into a federal question, Emerson now contends that the Pennsylvania Supreme Court's decision violated its right to due process.

REASONS FOR DENYING THE WRIT

1. Emerson Electric Company And Edwin L. Wiegand Division, Emerson Electric Company Never Properly Raised a Federal Question In The Pennsylvania Courts

The Petition for Writ of Certiorari does not merit the Court's review for two reasons. First, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company did not raise a federal question in the Pennsylvania courts. Second, Petitioners have not set forth any basis for which review by this Honorable Court is warranted.

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6. The trial court was in the best position to evaluate the quality and quantity of the actual evidence that plaintiff preserved. Emerson made its spoliation argument to the trial court on at least three occasions, at which time it had the opportunity to present all of the available evidence to the court and obtain a determination that the actual evidence preserved by Mount Olivet was inadequate. Each time, the trial court rejected Emerson's request for a sanction.

The United States Supreme Court's jurisdiction to review a decision of a state court is established by 28 U.S.C. § 1257, which states:

> **State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or *where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.* (emphasis added)

Similarly, Supreme Court Rule 14 requires that, where the appellant seeks review of a state court judgment, the petition for writ of certiorari must indicate, among other things, the stage in the proceedings (from the court of first instance through the appellate courts) where the federal question was raised, the manner of raising it and the way in which it was passed on by the courts, with pertinent quotations to specific portions of the record so as to show that the federal question was timely and properly raised.[7]

None of the state courts in this case addressed any federal question because Emerson never properly raised or

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7. Supreme Court Rule 15.2 requires that the brief in opposition to certiorari address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. The Rule further states: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition".

argued such a question. Emerson claims that a "fundamental fairness/due process rationale was a leitmotif of Emerson's briefs and argument.[8]" (Petition, p.4). Emerson then proceeds to cite instances in the record (only some of which are included in its Appendix) where it supposedly raised the due process issue. However, at most, Emerson refers to a few statements in various briefs and motions where it complains that it had been denied due process. Emerson has failed to demonstrate to this Court that it ever developed and presented an *argument* that would have provided the state courts with a fair opportunity to address the issue.[9]

In *Adams v. Robertson,* 520 U.S. 83; 117 S. Ct. 1028; 137 L. Ed. 2d 203 (1997), this Court dismissed a Writ of Certiorari as improvidently granted where the Petitioners raised their federal due process claim in their petition for rehearing before the Alabama Supreme Court. The Court stated that it has generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question. 520 U.S. at 89.

In reviewing state court judgments under 28 U.S.C. § 1257, the Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision. 520 U.S. at 86. When the highest state court is silent on a federal

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8. As an example of its "fundamental fairness/due process leitmotif", Emerson refers to its citation to *Northern Assurance Co. v. Ware,* 145 F.R.D. 281 (D. Maine 1993) in a Motion for Summary Judgment (which has not been included in the Appendix) and its statement that Mount Olivet's alleged spoliation of evidence "effectively eliminated Defendant's ability to present evidence to the jury as to the actual cause of the fire" (Emerson Petition, pp. 4-5). However, this Court has held that the casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Adams v. Robertson, supra,* 117 S.Ct. at 1030; *Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940, 1948, n.9 (1987).

9. Footnote 9 is missing.

question, the Supreme Court assumes that the issue was not properly presented. *Id., Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Id.* The Petitioner must demonstrate that it complied with the applicable state rules for raising a federal due process claim before the state Supreme Court, or explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim. *Id.* at 1030.

In *Webb v Webb,* 451 US 493, 68 L Ed 2d 392, 101 S Ct 1889 (U.S. 1981), this Court determined that a mother who sought custody of her minor child in proceedings in the state court had failed to properly raise or preserve, in the courts of that state, a federal constitutional claim that she raised in a certiorari petition filed in the Supreme Court. In dismissing the writ of certiorari, for want of jurisdiction, this Court noted that nowhere in the opinion of the highest state court was any federal question mentioned, let alone expressly passed upon. Moreover, a federal issue was not mentioned by the dissenting opinion in that court. The Court stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." 451 U.S. at 495; *see also, Street v. New York,* 394 U.S. 576, 582 (1969); *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 290, n. 3 (1973); *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945).

The *Webb* court stated:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the

> state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

451 U.S. at 501.

Neither the Pennsylvania Superior nor Supreme Court addressed any federal question in this case. Therefore, it is Emerson's burden to demonstrate that a federal question was properly presented to those courts. Emerson's Petition for a Writ of Certiorari fails to demonstrate that Emerson complied with the applicable state rules for raising its federal due process claim before the Pennsylvania appellate courts. For that reason alone, the Petition should be denied.

Emerson does not satisfy its burden by claiming that it "argued" in a post-trial motion that the trial court's denial of its request for a sanction "deprived defendants of their due process rights guaranteed by the United States and Pennsylvania Constitutions" (Emerson Petition, pp. 5). The issue is not whether Emerson asserted a federal claim in a trial court pleading, but whether such a claim was either addressed by, or properly presented to, the appellate court that rendered the decision that Emerson has asked this Court to review. *Adams v. Robertson,* 520 U.S. at 86.[10]

The spoliation argument in Emerson's Pennsylvania Superior Court Brief does not mention its supposed federal or state constitutional due process rights, and certainly does

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10. For the same reason, a federal question was not raised by Mount Olivet's Answer to Emerson's post-trial motion. Furthermore, an issue mentioned by the respondent in the state court does not demonstrate that the Petitioner properly presented the issue to the state appellate court. *Adams v. Robertson,* 520 U.S. at 89.

not assert any theory that could be characterized as a federal question. Moreover, that Brief did not cite any authority that would support a federal due process claim.[11]

Emerson's "due process" claim was barely alluded to, and certainly not developed, in Emerson's principal and reply briefs filed in the Pennsylvania Supreme Court. *Adams v. Robertson, supra,* 520 U.S. at 89, n.3 (passing invocations of "due process", with no citation to the Federal Constitution or any cases relying on the Fourteenth Amendment, are insufficient to raise federal question). Therefore, it was waived.

Emerson claims that it invoked its due process in the Supreme Court of Pennsylvania by noting in the "Statement of the Issues Presented" portion of its brief that the lack of a remedy for spoliation "violates the Defendant's rights to due process and a fair trial." (Emerson Petition, p. 7). However, under Pennsylvania law, an issue raised in the Statement of Questions, but not argued in the brief is deemed to be waived. *Ruzzi v. Butler Petroleum Company,* 527 Pa. 1, 588 A.2d 1, 11, n.1 (1991) (concurring opinion).

Emerson further claims that, in its brief to the Pennsylvania Supreme Court, it "pointedly invoked both federal and state due process before the Pennsylvania Supreme Court, in arguing that 'Emerson was denied

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11. Emerson asserts that "throughout the proceedings in the Pennsylvania intermediate appellate court, Emerson pressed its arguments rooted in due process and fundamental fairness"(Emerson Petition, p. 6). In support of that assertion Emerson claims that it argued in its Pennsylvania Superior Court brief that it was "substantially prejudiced", that it was deprived "of the ability to defend and mount an effective defense" and that the destruction of fire scene evidence deprived Emerson "of a fair opportunity to defend itself." (Id.) However, such boilerplate phrases, which could apply to any claim that the state court erred in ruling on an evidentiary issue, are not sufficient to invoke the different and broader question whether the Federal Constitution requires the imposition of a sanction. Despite Emerson's belief that such statements are "rooted in due process," they certainly do not meet the requirements of Rule 14. *see, Adams v. Robertson,* 520 U.S. at 88-89.

fundamental rights guaranteed to all litigants in this country and throughout this Commonwealth; the rights to due process and a fair trial after a balanced investigation of all relevant facts' " (Emerson Petition, p. 7). Emerson claims that its reference to " 'all litigants in this country' was, of course, an invocation of federal due process..." (Emerson Petition, p. 7). However, such a passing reference to "due process" with no citation to the Federal Constitution or any cases relying on the Fourteenth Amendment, does not meet this Court's minimal requirement that it must be clear that a federal claim was presented. *Adams v. Robertson, supra,* 520 U.S. at 89, n.3. Furthermore, the bald assertion of an undeveloped claim is not sufficient to preserve an issue for review by the Pennsylvania Supreme Court. *Madison Construction Company v. Harleysville Mutual Insurance Company,* 557 Pa. 595, 735 A.2d 100, 109, n.8 (1999) (court will not review undeveloped contention in footnote to brief where the issue was not included in appellant's Summary of Argument or in its Petition for Allowance of Appeal). Therefore, Emerson's casual reference to "due process" in its brief was insufficient to preserve a federal issue for review by either this Court or the Supreme Court of Pennsylvania.

Further, no federal question was raised in Emerson's Petition for Allowance of Appeal to the Pennsylvania Supreme Court or included in the "Statement of Issues Requiring Allowance of Appeal," within that filing. Therefore, even if Emerson's brief had contained more than a vague reference to a "due process" claim, that claim was clearly waived by reason of its lack of inclusion in Emerson's Petition for Allowance of Appeal and that document's statement of issues. *Lewis v. United Hospitals, Inc.,* 547 Pa. 626, 692 A.2d 1055, 1068, n.5 (1997); *City of Philadelphia v. Gray,* 534 Pa. 467, 633 A.2d 1090, 1091, n.1 (1993); *Thompson v. Mason Hospital,* 527 Pa. 330, 691 A.2d 703, n. 3 (1991); *Abramson v. Commonwealth Public Utility Commission,* 489 Pa. 267, 415 A.2d 50, 62 n.5 (1980)

("[d]ue [p]rocess argument waived where not properly presented in Petition for Allowance of Appeal").

In fact, Emerson first attempted to raise a federal "due process" argument in its Application for Reargument before the Pennsylvania Supreme Court.[12] However, at that point, it was too late to raise the issue. As in *Adams v. Robertson,* Emerson's Application for Reargument was insufficient to preserve the issue for review by this Court, when it was not previously presented to or addressed by the state appellate courts. 520 U.S. at 89.

The simple fact is that the focus of Emerson's spoliation argument in the Pennsylvania appellate courts was that the trial court supposedly improperly applied Pennsylvania spoliation law, as set forth by the Supreme Court in *Schroeder v. Pennsylvania Department of Transportation,* 551 Pa. 243, 710 A.2d 23 (1998). The Superior Court's opinion makes no mention of any federal issue. In affirming the Superior Court's order and denying Emerson's Application for Reargument, the Supreme Court issued only per curiam orders, with no opinion. Therefore, neither of the Pennsylvania appellate courts passed on or was properly presented with any federal issue. Accordingly, the sole claim upon which Emerson could have based a Petition for Writ of Certiorari has been waived for a variety of alternative reasons. *See generally, Harman v. Borah,* 562 Pa. 455, 765 A.2d 1116 (2000); *McMillen v. 84 Lumber, Inc.,* 538 Pa. 567, 572, 649 A.2d 932, 934 (1994); *Whistler Sportswear, Inc. v. Rullo, 289 Pa. Super.* 230, 240, 433 A.2d 40, 45 (1981).

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12. Emerson claims that, in its Application for Reargument, it "sought to ensure that the Pennsylvania courts had the fullest opportunity to explore the due process issue" (Emerson Petition, p. 8). However, in an argument of barely four pages, Emerson addressed the "due process" issue in the most superficial manner, not citing any factually similar cases. Instead, Emerson relied on decisions in criminal cases without explaining how the issues in those cases should apply to a civil products liability action (Emerson Petition, Appendix B, pp. 6a-10a).

Emerson fails to demonstrate that it preserved a federal question for review. Based on the issues that Emerson actually raised in the Pennsylvania appellate courts, its Petition for Writ of Certiorari is, on its face, fatally defective. Therefore, even if there were any substantive basis for granting certiorari, Emerson's Petition must be denied because it cannot demonstrate that a federal issue was raised in the Pennsylvania courts.

2. Spoliation Of Evidence Is An Evidentiary Issue Which Has Been Properly Decided By The Trial Court And Appellate Courts Of Pennsylvania

Emerson claims that the Pennsylvania Supreme Court's decision violated its right to due process because it affirmed the trial court's refusal to impose a sanction on Mount Olivet for the alleged spoliation of evidence. Emerson argues that the Pennsylvania court is guilty of "permitting such flagrant and unjustified spoliation" and, thus, has "given its blessing to this widespread technique for subversion of the adversary process and has permitted substantial deprivation of Emerson's opportunity to be heard in a "meaningful manner" (Emerson Petition, p. 9). Thus, the putative denial of due process was Emerson's inability to make use of "evidence" that it believed might have been useful in conducting a defense to Mount Olivet's claim. However, Emerson has never identified or even suggested what that "evidence" might be. Likewise, Emerson has not provided even an arguable explanation as to how that "evidence" would support its defense.[13]

The only issue properly presented to the Pennsylvania Supreme Court was whether the trial court committed an abuse of discretion in refusing to grant the various sanctions demanded by Emerson for the alleged "spoliation of

13. Rather, Emerson claims that if the church had not been in the process of reconstruction, it might have found evidence of some cause of the fire other than its defective heater.

evidence" by Mount Olivet. Both the trial court and the Pennsylvania Superior Court analyzed Emerson's spoliation argument in the context of the Pennsylvania Supreme Court's decision in *Schroeder v. Commonwealth of Pennsylvania, Department of Transportation, et al.*, 551 Pa. 243, 710 A.2d 23 (1998).[14] The Pennsylvania Superior Court held that application of the *Schroeder* test did not require the imposition of a sanction. The Pennsylvania Supreme Court affirmed in a per curiam order, with no written opinion.

Emerson now attempts to turn a Pennsylvania evidentiary issue into a case of constitutional proportions by gross exaggerations and distortions of fact.[15] However, aside from a few very broad statements of general legal doctrine, Emerson cites no authority for finding a denial of due process in the circumstance of this case.[16]

Furthermore, Emerson's Petition is void of any detail as to how the Pennsylvania Supreme Court's ruling violated its

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14. The *Schroeder* court adopted the Third Circuit's three-part standard for determining if a sanction is required. 710 A.2d at 27; *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). In deciding the proper penalty for the spoliation of evidence, the Third Circuit found relevant (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. 13 F.3d at 81.

15. For example, Emerson states with no evidentiary support that for nineteen months after the fire "the Church culled the scene in search of evidence to support its theory against Emerson" and that "the Church and its insurer, who controlled the fire scene for months after the fire were allowed to preserve only evidence which supported their theory of the case and destroy all other evidence long before notifying the target defendant, Emerson" (emphasis in original) (Emerson Petition, pp. 2, 9)

16. Emerson cites to criminal cases, paternity proceedings, social security benefits determinations and suspensions of drivers' licenses, but fails to explain how the issues peculiar to those actions have any bearing on the issues in this case(Emerson Petition, pp. 11-14).

due process rights.[17] Emerson contends that Mount Olivet and its counsel "deprived Emerson of the opportunity to defend itself against plaintiff's claims when the fire scene was destroyed..." and that "this situation demanded that some relief-either in the form of dismissal, preclusion of expert evidence, or some other type of sanction-be afforded to Emerson in order to neutralize the clear prejudice that had been caused by plaintiff's actions." (emphasis in original) (Emerson Petition, pp.13, 14). Obviously, even if those accusations were true, they concern the conduct of Mount Olivet, not any acts or omissions of the Pennsylvania courts.

In this regard, it is important to emphasize that "due process" is concerned with the *procedure* that the state follows in determining the rights and duties of the complaining party. Emerson does not claim that it was denied the opportunity to present its spoliation argument.[18] Nor does Emerson claim that there is any flaw in the procedure that the Pennsylvania courts follow to determine if a sanction is required.[19]

Rather, the alleged due process violation was apparently nothing more than the Pennsylvania courts' refusal to grant the relief that Emerson demanded. As such, Emerson's position is no different from any party who believes that it was placed at a disadvantage by a court's

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17. Emerson states that "the question is whether, having made the state courts available to a plaintiff like Mt. Olivet, the state can then use its evidentiary rulings to deny the defendant, Emerson, a meaningful hearing."

18. In fact, Emerson argued the "spoliation" issue at least three times before the trial court, submitted appellant's briefs and applications for reargument to the Pennsylvania Superior and Supreme Courts and presented oral arguments to both appellate courts.

19. Emerson does not argue that application of the *Schroeder* analysis itself violates due process rights.

ruling on an evidentiary issue. However, the right of due process does not guarantee a particular result.

Emerson took advantage of every opportunity to raise the "spoliation" issue and the courts properly and consistently rejected Emerson's arguments each time. However, even if all of the courts that considered the issue had erred in their rulings, Emerson has presented no legal authority for transforming that error into a constitutional violation.

Emerson cites only one decision by this Court that even remotely concerns an evidentiary issue. Emerson claims that there is a "striking parallel" between this case and *Little v. Streater,* 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), a paternity action in which the indigent defendant was denied access to blood tests of the child. However, the only "parallel" between the two cases is that the defendants in each case claimed that their due process rights were violated when the lower courts ruled against them on an evidentiary issue. In all other significant respects, the cases are completely distinguishable. As this Honorable Court observed, the defendant's due process claim in *Little* was "premised on the unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law." *Id.* at 6. Obviously, no similar concerns are present in this case.

In *Little,* the applicable statute required that the cost of blood tests in paternity actions be borne by the party requesting them. The court below ordered that the blood tests be taken, but refused the defendant's request that the state pay for the tests. This Court held that the statute violated the defendant's due process rights.

However, this Court's ruling was not based solely on the state's denial of access to evidence.[20] A critical factor in this Honorable Court's analysis was the fact that "state action" had "undeniably pervaded" the case because the state compelled the mother to identify the father and initiate an action to determine paternity, paid her litigation costs and would ultimately be the recipient of the monthly support payments made pursuant to the trial court's judgment. 452 U.S. at 9. This Court further observed that the nature of the paternity proceedings bore heavily on the due process claim because, although nominally "civil", they had "quasicriminal" overtones. *Id.* at 10.

Furthermore, this Court noted that, under Connecticut law, the defendant in a paternity action was placed at a distinct disadvantage in that his testimony alone was insufficient to overcome the mother's imputation of him as the father. *Id.* This Court reasoned:

> In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him... Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.

Id. at 12.

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20. Unlike the instant action, the evidence at issue in *Little* was unquestionably relevant. As this Court observed, the ability of blood grouping tests to exonerate innocent putative fathers was confirmed by a 1976 report developed jointly by the American Bar Association and the American Medical Association. *Id.* at 7. In contrast, Emerson claims that it was denied access to unidentified "evidence" to support an entirely speculative theory as to an alternative cause of the fire.

In finding that application of the statute violated the defendant's due process rights, this Court concluded:

> Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard."

Id. at 16.

Emerson relies almost entirely on the *Little* decision,[21] but completely ignores this Court's analysis of the elements that must be evaluated in determining what process is constitutionally due. Those elements are: the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected.[22] *Id.* at 13.

None of the concerns addressed in *Little* is even remotely implicated in this case.[23] First, the private

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21. Emerson cites other decisions of this Court only as support for broad statements of legal doctrine, without explaining how the circumstances of any of those cases are analogous to the circumstances of this case (Emerson Petition, pp. 10-14).

22. In *Little*, this Court found substantial private interests implicated in the creation of a parent-child relationship, as well as in the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance. *Id.* This Court also found that the availability of scientific blood test evidence clearly would be a valuable procedural safeguard to avoid the "not inconsiderable" risk that a defendant would be erroneously adjudged the father in its absence. *Id.* at 14. Finally, this Court found that the State's monetary interest in avoiding the expense of blood grouping tests was not significant enough to overcome the important private interests at issue. *Id.*

23. Emerson makes no attempt to explain how the above elements are satisfied, but merely asserts that "Pennsylvania has essentially denied Emerson 'the most probative additional evidence' needed to support its case." (Emerson Petition, p. 11).

interests at stake in this action are no greater than the interests of every defendant in every civil action. Emerson has admitted that it is a substantial, financially robust company[24] with resources more than sufficient to conduct a substantial and meaningful defense in this case. Indeed, Emerson retained several experts, conducted significant exemplary testing, built models of the church and floor and presented photographs, videotapes and documents. Moreover, Emerson has not identified any private interest in this product liability action that warrants constitutional protection.

Furthermore, there is little, if any, risk that the procedure followed by the Pennsylvania courts will lead to an "erroneous result" in the circumstances of this case.[25] In this regard, it is important to emphasize that this a classic product liability design defect case which was litigated consistently with the Rules of Evidence, Civil Procedure and relevant evidence. Emerson was protected from the possibility of an "erroneous result" at various stages of the trial and throughout the appellate process, as the evidentiary issues were reviewed and ruled upon consistent with the rules of evidence and case law. Regardless of whether any sanction was imposed, Mount Olivet still had the burden to prove that a defect in the design of Emerson's heater was responsible for the fire. The heater itself, along with substantial other physical evidence, thousands of photographs, videotapes and documents were presented and admitted into evidence.

Emerson chose not to defend the design of its product. Rather, Emerson claimed that its product did not cause the fire and then took advantage of every opportunity to raise a number of defenses including a creative "spoliation" issue

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24. According to Emerson's 2002 Annual Report, it had sales of $13.8 billion last year, with net earnings of $1.06 billion.

25. Again, Emerson does not challenge the *Schoeder* analysis or any other aspect of the Pennsylvania court's procedure in evaluating the "spoliation" issue. Emerson criticizes only the result.

before, during and after the trial and through the appellate process. Even if the Pennsylvania courts had erred in denying the relief demanded, there was no flaw in the procedure that created an impermissible risk of an erroneous result. Indeed, throughout discovery proceedings, Motions in Limine, Motions for Summary Judgment, trial, post-trial motions and the appeal, the process was examined and determined to be appropriate.

Finally, Emerson has not suggested a "procedural safeguard" of any value. In fact, it is difficult to determine what remedy Emerson is asking this Court to provide.[26] Emerson appears to demand that this Honorable Court promulgate a universal requirement that whenever a defendant claims spoliation of evidence, regardless of the merit of such claim, that a sanction be imposed. However, due process does not require such a fundamentally unfair remedy.

Such a "procedure" would permit a "spoliation" sanction to be used offensively to defeat an otherwise valid claim, as Emerson has attempted to do here. Following Emerson's argument, spoliation could be used as a defense whenever a defendant claims that it has been denied the opportunity to search for evidence that may or may not exist, and which may or may not be helpful to it. However, under Pennsylvania law, spoliation is a rule of evidence that permits the imposition of a sanction only in certain instances where the destruction of relevant evidence genuinely causes prejudice to a party. It is not intended as a back up defense to be used when the defense on the merits fails. Emerson urges this Court to impose a sanction for the supposed destruction of evidence of an alternative cause of the fire, but has never requested an evidentiary hearing nor offered testimony supporting such relief nor even provided a

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26. Emerson states that "remedies for spoliation will continue to evolve through legal and policy judgments made by state and federal courts, as well as by legislators."(Emerson Petition, p. 19).

credible theory as to a source of ignition other than the heater.

The *Schroeder* analysis provides the procedural safeguard that due process requires. It protects the rights of both plaintiffs and defendants through a case-by-case analysis of the degrees of fault and prejudice, if any, of each party. The Pennsylvania courts followed that analysis in determining that no sanction was required in this case.

Therefore, there has been no violation of any constitutional right and no grounds for this Court to grant Certiorari in this case. Accordingly, Mount Olivet Tabernacle Church respectfully requests that this Court deny Emerson's Petition for Writ of Certiorari.

3. Pursuant To Supreme Court Rule 42, Mount Olivet Is Entitled To Recover Damages And Costs From Emerson And Its Counsel

Supreme Court Rule 42 provides that, where a Petition for Writ of Certiorari is frivolous, the respondent may recover an award of "just damages and single or double costs" against the petitioner, its counsel or both. Mount Olivet respectfully submits that Emerson's Petition for Writ of Certiorari is frivolous both because it is based on an issue that was never raised in the state courts and because there is not even an arguable substantive basis for the claim.

Emerson claims that its "fundamental fairness/due process rationale was a leitmotif of" its briefs and arguments "at every stage of the Pennsylvania proceedings-in the trial, appellate and supreme courts..." (Emerson Petition, p. 4). However, Emerson cannot point to a single place in any of its many briefs to the Pennsylvania appellate courts where it presented a developed *argument* to the court with citations to appropriate legal authority. Emerson and its counsel are well aware that no such argument was ever made to either the Superior or Supreme Court, prior to their belated and first attempt to raise the

issue in their Application for Reargument to the Supreme Court.

Emerson's bad faith is further demonstrated by its superficial analysis of the "due process" claim in its Petition to this Court. Emerson completely ignores the elements that this Court has long evaluated in determining what process is constitutionally due. Instead, Emerson bases its argument on gross generalizations and broad statements of legal doctrine, and makes no effort to provide this Court with case law involving factual situations that are even remotely similar to this case. Emerson does not even favor this Court with a proposed remedy for the alleged violation of its rights.

Accordingly, Mount Olivet respectfully requests that this Court award damages against Emerson and its counsel for the attorney fees and costs incurred in preparing its Brief in Opposition. A Bill of Costs will be submitted to this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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